84-1285

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ALEXANDER L. STEVAS,
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARY JANE PALMER,
Petitioner,

vs.

FRANK W. PALMER, and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Insurance Corporation,
Respondents.

On Writ Of Certiorari To The
Supreme Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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THE QUESTION PRESENTED FOR REVIEW

Does Illinois' interspousal tort immunity statute deny equal protection of the laws?

LIST OF PARTIES

A. Mary Jane Palmer

B. Frank W. Palmer

C. State Farm Mutual Automobile Insurance Company, an insurance corporation

D. Fondulac Township, a governmental entity

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REPORTS OF OPINIONS

State Farm Mut. Auto. Ins. Co. v. Palmer, 123 Ill.App.3d 674, 463 N.E.2d 129, 78 Ill.Dec. 951 (Ill.App. 3 Dist., 1984).

JURISDICTIONAL STATEMENT

(i) The Appellate Court of Illinois entered its judgment on the 16th day of April, 1984.

(ii) The Illinois Supreme Court denied a Petition For Leave To Appeal on October 2, 1984.

(iii) The Supreme Court of Illinois denied a Motion For Leave To File A Motion For Reconsideration on November 7, 1984.

(iv) 28 U.S.C. §2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

No State shall. . .deny to any person within its jurisdiction the equal protection of the laws. Constitution of the United States, Amendment XIV.

A married woman may, in all cases, sue and be sued without joining her husband with her, to the same extent as if she were unmarried; provided, that neither husband nor wife may sue the other for a tort to the person committed during coverture, except for an intentional tort where the spouse inflicted physical harm. Chapter 40, Section 1001, Illinois Revised Statutes (1981).

28 U.S.C. §2403(b) may be applicable, and a copy of this Petition has been served on the Attorney General of the State of Illinois. U.S. Supreme Court Rule 28(c).

STATEMENT OF THE CASE

On September 12, 1981 Mary Jane Palmer suffered fractures of vertebrae in her neck, and compound fractures of her left leg. The injuries were suffered while Mary Jane was a passenger in a motor vehicle being driven by her husband, Frank W. Palmer. The motor vehicle collided with a bridge abutment owned by Fondulac Township in Tazewell County, Illinois.

Shortly before the collision, while the automobile was parked at the side of the road, Frank exacted from Mary Jane a confession that she had engaged in extramarital sexual relations. The Palmers were living together in their jointly owned home in Champaign, Illinois, although they had been to an attorney to begin the process of dissolving their marriage.

At the time of the collision the automobile was insured by State Farm Mutual Automobile Insurance Company.

A number of lawsuits were filed, including two out of which this Petition For Certiorari arises. They are: an action by Mary

Jane against Frank for negligence and battery, which was later amended to include Fondulac Township for negligence, and, an action by State Farm against Mary Jane, Frank and Fondulac Township for declaratory judgment.

In the action brought by Mary Jane against Frank, the trial court granted Frank's motion for summary judgment with respect to the court sounding in negligence, based on Frank's defense of interspousal immunity. In State Farm's declaratory judgment action, the trial court held that, by reason of the household exclusion clause in the policy, Mary Jane's auto insurance policy afforded no liability coverage for Frank in Mary Jane's negligence suit against him.

Frank's motion for summary judgment on the battery count in Mary Jane's action was denied by the trial court, based on the 1981 amendment of the interspousal immunity statute to abrogate the doctrine in cases of intentional tort.

Mary Jane first raised the equal protection federal question in her response to Frank's motion for summary judgment. The argument was included in her points and authorities filed on May 26, 1982, which appear in the record at C-54. By granting Frank's motion for summary judgment, the trial court overruled Mary Jane's equal protection argument. Pages 21 through 25 of Mary Jane's Brief and Argument in the Appellate Court contained her equal protection arguments. The Appellate Court overruled the equal protection arguments, despite Mary Jane's "persuasive arguments", (*State Farm Mut. Auto. Ins. Co. v. Palmer,* 123 Ill.App.3d 674, 677, 463 N.E.2d 129, 131, 78 Ill.Dec. 951, 953) relying on *Heckendorn v. First National Bank of Ottawa* (1960), 19 Ill.2d 190, 166 N.E.2d 571. Pages 21 through 26 of Mary Jane's Petition For Leave To Appeal to the Supreme Court of Illinois contained her equal protection argument. The Illinois Supreme Court denied her Petition For Leave To Appeal (Appendix A). Subsequent to the filing of the Petition For Leave To Appeal, *Moran v. Beyer,* 734 F.2d 1245 (7th Cir. 1984) was published. *Moran* was brought to the atten-

tion of the Illinois Supreme Court by way of Mary Jane's Motion For Leave To File A Motion For Reconsideration, which was also denied on November 7, 1984 (Appendix B).

ARGUMENT

The Courts Of Last Resort Of The State Of Illinois Have Decided A Federal Question In A Way Which Is In Conflict With The Decision Of A Federal Court Of Appeals.

On May 21, 1984 the United States Court of Appeals for the Seventh Circuit held Illinois' interspousal immunity statute to be in violation of the equal protection clause of the Fourteenth Amendment of the Constitution. *Moran v. Beyer,* 734 F.2d 1245 (7th Cir. 1984). In *Moran,* Mrs. Moran sued Daniel Beyer complaining that he had injured her on a number of occasions. By the time the action was brought, the two were no longer married. Moran alleged one count of assault and battery and one count of intentional infliction of emotional distress. Had the paths of the two individuals crossed under any circumstances other than marriage, the District Court would have proceeded to determine the merits of the case. However, the District Court was confronted with Illinois' interspousal immunity statute, since Beyer moved for summary judgment, contending that Moran's action was barred by the immunity statute. The trial court granted summary judgment in Beyer's favor.

Moran contended that there was no rational relationship between the statutory classification and the legislature's purpose in enacting it. The Court of Appeals found "the pertinent inquiry to be whether the scheme, which prevents a married person from seeking a remedy which is available to an unmarried person, advances a reasonable and identifiable governmental objective". *Id.* at 1247. The court found maintaining marital harmony to be an admirable goal, but could not agree that Chapter 40, Section 1001 was rationally related to the goal. To find some objective basis for believing that depriving a physically battered spouse of a civil remedy would advance some sense of

"harmony" with the person who inflicted the injury, would truly take "something more than the exercise of strained imagination". *Ibid.* The court quoted Dean Prosser's dismantling of the "domestic harmony" rationale, as follows:

> 'The bald theory that after a husband has beaten his wife, there is a state of peace and harmony left to be disturbed; that if she is sufficiently injured or angry to sue him for it, she will be soothed and deterred from reprisals by denying her the legal remedy - and even though she has left him or divorced him for that very ground[.]' *Id.* at 1247.

The immunity rule confuses cause and effect.

> Because the immunity rule leaves unchecked the actual cause of marital discord - such as the assault and battery committed in this case - it can do absolutely nothing to further marital harmony. Indeed, for a knowledgeable couple leery of marriage, the statue may do more to retard the institution than further it: unmarried persons living together can still resort to the courts for protection from a 'partner', while a married person has no such protection against his or her spouse. Finally, added to these inconsistencies is the fact that nothing in the statute prevents one spouse from undermining domestic tranquility all together by swearing out a criminal complaint against the other. *Ibid.*

By reason of recent legislative amendment, Mary Jane may maintain her intentional tort claim against Frank. *Moran* involved a claim for battery, an intentional tort. The case *sub judice,* involves a negligence claim. So, it is true, the two cases can be distinguished. But, the distinction would be strained. The arguments supporting the irrationality of the grant of immunity apply with equal force whether an intentional tort or a negligence claim is involved. As was stated in *Moran,* it is not at all rational to believe that the Legislature's desire to protect marital harmony is fulfilled by Chapter 40, Section 1001, which

does little more than grant one spouse almost unconditional license to make his marriage partner a sparing partner. *Id.* at 1248.

The Third District Appellate Court in effect conceded there was no rational basis for the legislative purpose, since encouraging, promoting and maintaining marital harmony had no applicability to the case then before that court. *State Farm Mut. Auto. Ins. Co. v. Palmer* (1984), 123 Ill.App.3d 674, 677, 463 N.E.2d 129, 132, 78 Ill.Dec. 951, 954. Perhaps the Third District Opinion can be justified on the ground that it had no knowledge of the Opinion in *Moran*. The Supreme Court of Illinois knew of *Moran,* and ignored it. *Moran* is the more compelling authority, and Mary Jane is denied equal protection when *Moran* is ignored.

The *Moran* court honed in on the inconsistency when it recited that an Illinois spouse could swear out a criminal complaint against the other spouse. But, that is not the complete picture. The Illinois statute grants the immunity only for torts to the person of the spouse. There is no immunity for any tort against property. Thus, Mary Jane could sue Frank for the damage done to her Volkswagen automobile. Any wife has that right. And, a wife may recover from a husband for conversion, or detention of chattels, or for fraud, or for trespass to land, or for waste, or for negligent damage to property, or for ejectment, or for partition, or for unlawful detainer, or for "outrage", or for any of the other myriad of kinds of actions in which damages can be sought. It is only for damage done to her body to which the immunity applies. As *Moran* indicates, the constitutional infirmity of the statute arises out of the irrational categorization of remedies.

The statute may also be in violation of the privileges and immunities clause of the Fourteenth Amendment. A recent Arizona case makes the point. In *Fernandez v. Romo,* 132 Ariz. 447, 646 P.2d 878 (1982), the Arizona Supreme Court abolished the doctrine of interspousal immunity in automobile

accident cases. The Court recognized the anomaly of the law which allowed a New York wife to sue her husband in Arizona for injury negligently inflicted by her husband while on vacation in Arizona, but denied Arizona citizens the use of their own courts for the same purpose. The same situation exists in Illinois.

CONCLUSION

Illinois' interspousal immunity statute denied Mary Jane Palmer equal protection of the laws and her privileges and immunities as a citizen of the United States. Mary Jane therefore prays The Honorable Supreme Court of the United States to grant certiorari and to examine into these grave constitutional questions.

Respectfully submitted,

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APPENDIX

APPENDIX A

Illinois Supreme Court
Juleann Hornyak, Clerk
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

October 2, 1984

Mr. James L. Hafele
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717 First National Bank Bldg.
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No. 60185 - State Farm Mutual Automobile Insurance Company, etc., et al., etc., respondents, vs. Mary Jane Palmer, et al., etc., et al. (Mary Jane Palmer, petitioner). Leave to appeal, Appellate Court, Third District.

The Supreme Court today *DENIED* the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Clerk of the Appellate Court on October 23, 1984.

APPENDIX B

State of Illinois
Supreme Court Clerk
Supreme Court Building
Springfield 62706

November 7, 1984

Juleann Hornyak
Clerk of the Court
(217) 782-2035

Mr. James L. Hafele
Attorney at Law
717 First National Bank Bldg.
Peoria, IL 61602

THE COURT AS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 60185 - State Farm Mutual Automobile Insurance Co., etc., et al., respondents, v. Mary Jane Palmer, petitioner.

The motion by petitioner for leave to file a motion for reconsideration of the order denying petition for leave to appeal is *denied.*

The mandate of this Court today issued to the Clerk of the Appellate Court, Third District.

JH:th
cc: James Martinkus
Maximillian M. Prusak
Robert Jackson

Juleann Hornyak, Clerk

APPENDIX C

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Insurance Corporation, Plaintiff-Appellee,

v.

Mary Jane PALMER and Fondulac Township, a Governmental Entity, Defendants-Appellants,

and

Frank W. PALMER, Defendant-Appellee.

**Mary Jane PALMER,
Plaintiff-Appellant,**

v.

Frank W. Palmer, Defendant-Appellee,

and

Fondulac Township, A Governmental Entity, Defendant

No. 3-83-0163.

Appellate Court of Illinois,
Third District.

April 16, 1984.

BARRY, Justice.

At the heart of the five appeals here consolidated lie the simplicity of the vows of matrimony, the complexities of marriage and a contract entered into by the married couple, and, unfortunately, the bitter litigation that too often accompanies the destruction of the marital union. Mary Jane and her husband, Frank Palmer, were still residing together in their Champaign home on September 19, 1981, despite some marital discord. They travelled together to Peoria on that date to attend a wedding anniversary celebration. That evening, on their way

to Frank's father's home in East Peoria, while Frank was at the wheel of their 1980 Rabbit auto and Mary Jane was seated in the front passenger seat, Frank exacted from Mary Jane a confession that she had had extramarital relations with her boss. Angry words were exchanged, Frank hit Mary Jane, and the auto hit a bridge abutment on Farmdale Road in Tazewell County. The extent of the physical confrontation between the Palmers subsequent to the accident is a matter of considerable dispute. In any event, Mary Jane had suffered two fractured neck vertebrae, a bent partial dental plate, and a broken leg by the time she was removed from the car and delivered to the hospital for treatment. At the time of the accident the Rabbit was covered by an automobile liability insurance policy with State Farm Mutual Automobile Insurance Company issued in Mary Jane's name.

A flurry of lawsuits ensued, including an action for the dissolution of the Palmers' marriage; a suit by Frank against Mary Jane's paramour for alienation of affections; a suit by Mary Jane against Frank for negligence and battery, later amended to include Fon du Lac Township for negligence; a counter-suit by Fon du Lac Township against Frank for indemnity and contribution; and a suit by State Farm against Mary Jane, Frank and Fon du Lac Township for declaratory judgment. The dissolution and alienation of affections actions are not before us now. The remaining lawsuits are.

In the suit brought by Mary Jane against Frank, the trial court granted Frank's motion for summary judgment with respect to the count sounding in negligence, based on Frank's assertion of the defense of interspousal immunity. With respect to the intentional tort count, the court denied Frank's motion. In the insurer's declaratory judgment cause, the court held that, by force of the household exclusion clause, Mary Jane's auto insurance policy afforded no liability coverage for Frank as a defendant in Mary Jane's suit against him or for contribution. The trial court certified the case for immediate appeal pursuant

to Supreme Court Rules 304(a) and 308(a) (73 Ill.2d R. 304(a), 308(a)).

As aforesaid, five appeals are before us for our review. In 83-163, 177 and 188, Mary Jane, Frank, Fon du Lac Township uniformly complain that the trial court erred in declaring that the Palmer's insurance policy afforded no liability protection for Frank either as a defendant in Mary Jane's suit or for contribution and indemnity in Fon du Lac's counter-complaint against Frank. In 83-268, Frank contends that the trial court erred in denying his motion for summary judgment with respect to the intentional tort count of Mary Jane's complaint. And in 83-308, Mary Jane contends that the trial court erred in granting Frank's motion for summary judgment with respect to her negligence cause of action against him.

We consider in the first instance the issues raised by Mary Jane: 1) whether Frank's assertion of interspousal immunity bars Mary Jane's negligence cause of action against him; 2) whether Frank's waiver of the conflict of interest created by his insurer's defending him was made with Frank's knowledgeable consent; and 3) whether State Farm's "family exlusion" clause in Mary Jane's liability insurance policy precludes coverage for Frank in the claims filed by Mary Jane and Fon du Lac Township.

Initially, we must reject persuasive arguments advanced on behalf of Mary Jane that the doctrine of interspousal immunity violates constitutional rights and contravenes modern realities. The Illinois legislature has seen fit to retain the defense as a codification of the public policy of this State. (Ill.Rev.Stat.1981, ch. 40, par. 1001.) Interspousal immunity is not unconstitutional on due process or equal protection grounds (*Heckendorn v. First National Bank of Ottawa* (1960), 19 Ill.2d 190, 166 N.E.2d 571).

Nor does the doctrine violate the privileges and immunities clause of the Federal Constitution. The right to recover or debar

recovery in tort from one's spouse is not a fundamental "privilege" or "immunity" bearing upon the vitality of the nation such that Illinois must conform its laws to treat all citizens, whether resident or nonresident, equally. Thus, the mere fact that the doctrine of interspousal immunity has been abrogated in the great majority of states on public policy grounds does not, *ipso facto,* invalidate the statutory defense in Illinois.

Next Mary Jane aruges that interspousal immunity applies only during "coverture." Since she was residing with Frank by force of his intimidation rather than his protection and affection, she contends that coverture did not exist in the marital home. While we certainly recognize the inapplicability of one of the bases for enacting interspousal immunity (i.e., to encourage, promote and maintain marital harmony) to the unfortunate situation giving rise to the negligence cause of action herein, we are not persuaded thereby that "coverture," as that term is used in "An Act in relation to husband and wife" (Ill.Rev. Stat. 1981, ch. 40, par. 1001), means anything more than "marriage." (*See Soedler v. Soedler* (3d Dist.1080), 89 Ill.App.3d 74, 76, 44 Ill.Dec. 425, 426, 411 N.E.2d 547, 548.) Mary Jane and Frank's marriage, while not harmonious at the time of the accident, had not been disolved. Since the personal injury negligence cause of action against Frank involved "a tort to the person committed during coverture [marriage]," the interspousal immunity defense was available as a procedural bar to Count I (negligence) of Mary Jane's complaint.

We have reviewed the record on appeal and find that the questions of a possible conflict of interest and Frank's waiver of that conflict were adequately explored and resolved in the trial court. We have no doubt that Frank intended to use the statutory immunity available to him as a personal defense of Mary Jane's lawsuit to deprive her of any recovery for her injuries. In this case, State Farm, while agreeing to pay for independent defense counsel selected by Frank, had the same interest as Frank in avoiding Mary Jane's negligence cause of ac-

tion. Frank's waiver of his attorney's possible conflict of interest and his assertion of the personal defense was made as knowledgeably and as intelligently as could be hoped for under the circumstances. For the foregoing reasons we hold that the trial court correctly granted summary judgment for Frank and against Mary Jane on Count I of her complaint, sounding in negligence.

We turn next to Mary Jane's contention that State Farm's family exclusion clause is invalid because it is overbroad, in contravention to Illinois public policy, and ambiguous. The clause in question is contained under "Section I—Liability—Coverage A" and the paragraph entitled "When Coverage A Does not Apply." It reads as follows:

> "In addition to the limitations of coverage in 'Who Is An Insured' and 'Trailer Coverage' THERE IS NO COVERAGE . . . FOR ANY BODILY INJURY TO: . . . ANY MEMBER OF THE FAMILY OF THE INSURED RESIDING IN THE SAME HOUSEHOLD AS THE INSURED, The term 'insured' as used here means the *person* against whom claim is made or suit is being brought."

Mary Jane argues that the trial court's judgment in favor of State Farm is overbroad because it declared non-coverage with respect to Fon du Lac Township's counter-complaint against Frank. She also contends that the exclusion clause itself is overbroad and ambiguous because it extends to family members residing in the insured's household without precisely defining the boundaries of a familial relationship. Frank joins Mary Jane's position, adding that ambiguity can be found by referring to "Section II—Medical Payments—Coverage C" which does not exclude family members.

As conceded by State Farm, the trial court's declaratory judgment in favor of hte insurer extends only to the enforcement of "Section I—Liability—Coverage A." Liability coverage under the section at issue is specifically and unambiguously excluded

with respect to Mary Jane's direct suit against Frank. The court's order does not preclude, however, any other recovery which may be available to Mary Jane under other sections of the policy which might apply. Furthermore, Fon du Lac's inability to recover from Frank's insurer on its counter-complaint does not preclude it from prosecuting its cause of action against Frank. Any issues respecting insurance coverage other than "Liability Coverage A" are not before us. We reject Mary Jane and Frank's arguments that the trial court's order is overbroad.

The contractual exclusion does not violate the public policy of this State. Mary Jane's public policy arguments are essentially adopted by Fon du Lac Township and were addressed and resolved in favor of State Farm in *State Farm Mutual Auto Ins. Co v. Suarez* (1st Dist.1982), 104 Ill.App.3d 556, 60 Ill.Dec. 305, 432 N.E.2d 1204.

In *Suarez* as here, the insureds were husband and wife who sought to recover damages from an allegedly negligent third party. In *Suarez,* the third party, Ingles, was the driver of the car with which the Suarez vehicle collided. Ingles countersued for contribution from Victor, who drove the Suarez car, on grounds that he was partially responsible for his wife's (Estrella's injuries. The Suarez' policy of insurance contained the same "family exclusion clause" that appears in the policy before us. State Farm, as here, filed a declaratory judgment action denying that the Suarez' insurance policy afforded liability coverage to Victor for the contribution claim. Summary judgment was granted in favor of State Farm, the court ruling that the clause at issue was clear and unambiguous, not in violation of Illinois public policy and finding further that State Farm was not obligated to indemnify Victor for any judgment obtained by Ingles in the contribution suit.

In our opinion, the *Suarez* decision adequately disposes of all remaining arguments of merit advanced by Mary Jane, Frank and Fon du Lac Township urging reversal of the trial court's award of summary judgment for State Farm in the declaratory

judgment action. We need not replow the grounds stated in *Suarez* to affirm the trial court's judgment. Suffice it to say, we adopt the *Suarez* reasoning.

The final issue before us in these appeals was advanced by Frank: whether recent amendments to section 1 of "An Act to revise the law in relation to husband and wife" (Ill.Rev.Stat.1981, ch. 40, par. 1001)—i.e., P.A. 82-569 and P.A. 82-783—are substantive changes which must be applied prospectively so as to require dismissal of Mary Jane's intentional tort cause of action based on Frank's interspousal immunity defense.

The statute in effect on the date of the accident stated simply "that neither husband or wife may sue the other for a tort to the person committed during coverture." (Ill.Rev.Stat.1979, ch. 40, par. 1001.) To that sentence, Public Act 82-569 (reenacted by the 1982 Revisory Act, P.A. 82-783, Art., III) added "other than an intentional tort." P.A. 82-569 has an effective date of September 24, 1981. The incident giving rise to Mary Jane's Count II, sounding an intentional tortious misconduct, accrued on September 12, 1981. Mary Jane's complaint was filed on December 18, 1981. The crux of Frank's argument on appeal is that the amendatory act affects a matter of substantive law and may apply only to actions accruing subsequent to the date of enactment. We cannot agree.

In *Allstate Ins. Co. v. Elkins* (1979), 77 Ill.2d 384, 33 Ill.Dec. 139, 396 N.E.2d 528, our supreme court concluded "that the effect of the 1953 amendment [codifying interspousal immunity] was not to destroy the cause of action of the injured spouse, but to confer immunity on the tortfeasor spouse, *which like a defense based on the statute of limitations can be waived by the defendant spouse.*" (Emphasis added.) (77 Ill.2d at 390, 33 Ill.Dec. at 142, 396 N.E.2d at 531.) Subsequent appellate decisions have interpreted *Elkins* to mean that interspousal immunity is now a *procedural,* rather than substantive, defense. (*Wirth v. City of Highland Park* (2nd Dist.1981), 102 Ill.App.3d 1074,

1077. 58 Ill.Dec. 294, 297, 430 N.E.2d 236, 239; *Larson v. Buschkamp* (2d Dist.1982), Ill.App.3d 965, 61 Ill.Dec. 732, 435 N.E.2d 221; *Farmers Ins. Group v. Nudi* (1st Dist.1982), 108 Ill.App.3d 151, 63 Ill.Dec. 897, 438 N.E.2d 1260.) Thus interpreted, *Elkins* casts doubt on the precedential value of *Heckendorn v. First National Bank of Ottawa* (1960), 19 Ill.2d 190, 166, N.E.2d 571, in which the court held that interspousal immunity operated as a *substantive,* rather than procedural, bar to a widow's claim against her husband's estate. In any event, recent appellate decisions have held that claims by third parties for contribution are not barred by the interposition of the interspousal immunity defense by an insurer of the allegedly negligent spouse. *Wirth: Larson; Nudi.*

In our opinion, these recent appellate decisions, grounded on an interpretation of *Elkins* to the effect that interspousal immunity is a procedural defense, comport with the public policy underpinning the common law doctrine. If "domestic tranquility" or preservation of marital harmony are to be achieved by enforcing interspousal immunity, then, by construing the statutory defense as procedural and permitting the tortfeasor spouse to waive its effect, the injured spouse may nonetheless recover for injuries and, hopefully, alleviate unnecessary marital stress where the payor of damages may be a third party, as opposed to the tortfeasor spouse himself.

The guidance we find in *Elkins* and its progeny, however instructive, does not bear directly on the question before us today. The determination of whether a statutory amendment may be applied retroactively or prospectively only is primarily a question of legislative intent. (*Champaign County Nursing Home v. Petry Roofing* (4th Dist.1983), 117 Ill.App.3d 76, 78, 72 Ill.Dec. 594, 596, 452 N.E.2d 847, 849 (citing *Moore v. Jackson Park Hospital* (1983), 95 Ill.2d 223, 69 Ill.Dec. 191, 447 N.E.2d 408)).

We do not have the benefit of the legislators' comments on Senate Bill 115 of the 1981 regular session, "An Act relating to

interspousal torts" (enacted as P.A. 82-569). Nonetheless, P.A. 82-569, section 3, recites "This amendatory Act shall take effect upon becoming law." We glean from that that the legislature intended an earlier, rather than later, effective date, since the legislators' silence on an effective date would have dictated a January 1, 1982, effective date. By adding section 3, the legislators ensured that the new law would take immediate effect upon the governor's signature of approval. (See Ill.Const.1970, Art. 4, § 10; Ill.Rev.Stat.1981, ch. 1, par. 1201.) Inasmuch as interspousal immunity is not generally viewed as procedural, and there is no specific legislative intent to implement the amendatory act on a prospective basis only, we find no error in the trial court's determination that Mary Jane's cause of action for intentional tort (Count II) survives Frank's assertion of the immunity defense.

In so ruling, we are not bound by a rigid "procedural" versus "substantive" formula. Modern jurists look beyond the apparent simplicity of semantic dichotomies to achieve a fair and reasonable result. As observed by Justice Mills in *Champaign County Nursing Home,*

> "Whether retroactive application of legislation is permissible is not dependent on such outmoded distinctions as whether vested or nonvested rights are affected, or whether a statute affects rights or merely affects remedies. Rather, such cases must be decided on the basis of whether basic concepts of justice, fairness and equity militate for or against the retroactive application of the statute of a particular class of persons. Generally, retroactive statutes which courts have declared invalid have been deemed 'oppressive, impolitic, unjust, arbitrary, do substantial injury, are unreasonable, wanting in equity, [and] inconsistent with "the prevailing views of justice," (Smith, Retroactive Laws and Vested Rights, 5 Tex.L.Rev. 231, 247-48 (1927).) The competing interests of the affected persons must be carefully weighed in order to arrive at a just result. See

> Smith, Retroactive Laws and Vested Rights II, 6 Tex.L.Rev. 409, 427, 431 (1928); see also *Moore* [*v. Jackson Park Hospital*] 95 Ill.2d 223, 242-43, 69 Ill.Dec. 191, 199, 447 N.E.2d 408, 416 (Ryan, J., concurring)." 117 Ill.App.3d at 79-80, 72 Ill.Dec. at 597, 452 N.E.2d at 850.

In our opinion, the interests and reasonable expectations of the injured plaintiff, allegedly the victim of a battery at the hands of her husband, outweigh the defendant's expectation that legislation enacted subsequent to the incident but prior to the filing of her complaint would not deprive him of an opportunity to defeat his wife's direct suit by virtue of the legislative act. Furthermore, our holding today is not inconsistent with the historically-cited public policy bases for the doctrine of interspousal immunity—the primary one being to promote domestic tranquility and a secondary one being to guard against the danger of collusion by the married parties. As cogently observed by the court in *Brandt v. Keller* (1952), 413 Ill. 503, 109 N.E.2d 729, neither of these stated concerns can be said to have been served in a situation where, as here, an intentional tort claim arises during the final throes of a marriage. "When one spouse assails another or brings suit, there is not much domestic tranquility left to disrupt. * * *. [T]he potentiality of collusion, or of the preversion of the administration of justice exists in all litigation, and cannot properly constitute legal grounds for construing a statute." 413 Ill. at 511, 109 N.E.2d at 733.

For the foregoing reasons, we affirm the judgments of the trial court with respect to each issue raised in these appeals and remand this cause for further proceedings.

HEIPLE and SCOTT, JJ., concur.

Office-Supreme Court, U.S.
FILED
MAY 13 1985
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-1285

IN THE
SUPREME COURT OF THE UNITED STATES

1984 - 1985 Term

MARY JANE PALMER,

Petitioner,

vs.

FRANK W. PALMER, and
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,
an Insurance Corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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No. 84-1285

IN THE
SUPREME COURT OF THE UNITED STATES

1984 - 1985 Term

MARY JANE PALMER,

Petitioner,

vs.

FRANK W. PALMER, and
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,
an Insurance Corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Respondent, FRANK W. PALMER, respectfully prays that this Court deny the Petition for a Writ of Certiorari seeking review of the constitutionality of the Illinois interspousal tort immunity statute.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN MORAN V. BEYER, 734 F.2d 1245 (7th CIR., 1984) SHOULD BE LIMITED TO INTENTIONAL INTERSPOUSAL TORTS.

At the time Mary Jane Palmer's cause of action arose on September 12, 1981, the following statute was in effect in Illinois:

> "A married woman may, in all cases, sue and be sued without joining her husband with her, to the same extent as if she were unmarried; provided, that neither husband nor wife may sue the other for a tort to the person committed during coverture. An attachment or judgment in such action may be enforced by or against her as if she were a single woman." Ill.Rev.Stats., Chapter 40, Section 1001 (1979).

Effective September 24, 1981, the law was amended to read as follows:

> "A married woman may, in all cases, sue and be sued without joining her husband with her, to the same extent as if she were unmarried; provided, that neither husband nor wife may sue the other for a tort to the person committed during coverture, other than an

> intentional tort...An attachment or judgment in such action may be enforced by or against her as if she were a single woman." Ill.Rev.Stats., Chapter 40, Section 1001 (1983).

In State Farm Mutual Insurance Company v. Palmer, 123 Ill.App.3d 674, 463 N.E.2d 129, 78 Ill.Dec. 951 (Ill.App. 3d Dist., 1984), the Illinois Third District Appellate Court retroactively allowed Mary Jane Palmer's intentional tort claim. The decision of the Illinois Appellate Court in State Farm Mutual Insurance Company v. Palmer is consistent with this new legislative amendment and with the rationale advanced in Moran regarding intentional interspousal torts.

The Court of Appeals in Moran found that there was no rational relationship between the Illinois interspousal tort immunity statute and the purpose of maintaining marital harmony under circumstances involving a "physically battered spouse." Id. at 1247.

These are not the circumstances under which Mary Jane Palmer calls upon this Court to review the rational relationship between the Illinois interspousal tort immunity statute and the purpose of maintaining marital harmony or any other reasonable governmental objective. Mary Jane Palmer will have her day in court against Frank Palmer concerning the alleged intentional tort inflicted upon her. She also now seeks a judicial declaration that this inquiry is the same in connection with a negligent tort. Frank Palmer urges this Court to reject this interpretation.

A clearly reasonable governmental objective exists for the classification distinguishing married and non-married persons in that the state has a valid interest in protecting marriages. The interspousal tort immunity doctrine prevents one spouse from gaining at the expense of the

other and thereby destroying the community of interests which constitutes the marriage.

There is a significant difference on the impact of the marital relationship when a spouse is injured "negligently" as opposed to "intentionally" by conduct of the other spouse. While the very nature of an intentional tort is pervasively disrupting to the marital relationship, such is not the case with a negligently inflicted tort. The subsequent discord and stress of an action against the negligent spouse by the injured spouse is much more likely to strain or destroy the marriage.

The Act serves an additional purpose of preventing fraudulent claims. If a spouse were able to collect for injuries to the person on a negligence theory, there would be a realistic temptation to bring fraudulent claims against the other spouse.

A similar temptation does not exist for claims for property damage because the

recovery in such cases is limited to the amount proved to have been lost. The effect of an action for property damage is to restore the parties to their original position and one party does not gain from bringing the action. Because of the lack of gain, there is no temptation to bring fraudulent claims and disrupt the marriage.

Because Ill.Rev.Stats., Chapter 40, Section 1001 protects marriages and prevents fraud, the classification discriminating between married and non-married persons and persons who suffer personal injuries and persons who suffer injuries to property is justifiable and should be upheld in the context of a negligent tort.

II.

THE ILLINOIS INTERSPOUSAL TORT IMMUNITY STATUTE DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE UNITED STATES CONSTITUTION

MARY JANE PALMER, at page 7 of her Petition, argues that Ill.Rev.Stats.,

Chapter 40, Section 1001, is unconstitutional because it violates the privileges and immunities clause of the Fourteenth Amendment to the United States Constitution. She bases her argument on Fernandez v. Romo, 132 Ariz. 447, 646 P.2d 878 (1982) and its companion case, Schwartz v. Schwartz, 103 Ariz. 562, 447 P.2d 254 (1968).

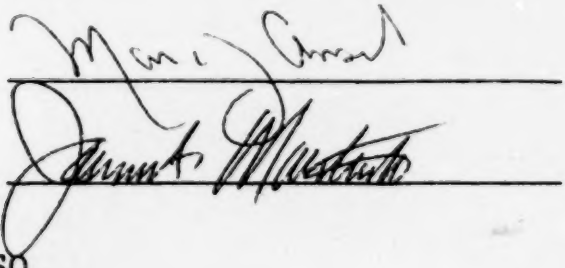
The Arizona cases of Fernandez v. Romo and Schwartz v. Schwartz do not support the argument that the Illinois interspousal tort immunity statute violates the privileges and immunities clause. In Schwartz v. Schwartz, the Arizona Supreme Court applied the New York law of interspousal tort immunity to apply to a suit between a New York domiciled husband and wife resulting from an accident which occurred in Arizona. This was a conflicts-of-law case.

In Fernandez v. Romo, the Arizona court simply abolished its court-created doctrine of interspousal tort immunity. Neither case involved the privileges and immunities clause.

CONCLUSION

The Illinois Supreme Court's decision not to review an Illinois Appellate Court's decision upholding the constitutionality of the Illinois interspousal tort immunity statute concerning negligent torts between spouses should not be disturbed. Because there is a rational relationship between the statute and its purpose in connection with interspousal negligent torts, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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